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Supreme Court, U.S.
FILED

No. 97-440 JUN 27 1997

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

D.R., BY HIS PARENTS AND LEGAL GUARDIANS,
M.R. and B.R.,

Petitioner,

V.

EAST BRUNSWICK BOARD OF EDUCATION

Respondent.

Petition for a Writ of Certiorai to the United States Court of Appeals for the Third Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an agreement settling a dispute concerning the special education of a handicapped pupil can ever be set aside under the Individuals with Disabilities Act ("IDEA")? 20 U.S.C.A. §1401, et seq.

2. If so, under what circumstances can such an agreement be set aside?

3. Should the criteria for setting aside an agreement involve a change in circumstances occurring after the execution of the agreement which would cause a denial of an appropriate education if the agreement is enforced?

4. Does the agreement in the case at bar compel the family to bear the cost of additional services, and if it does, can the agreement be set aside?

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PETITION FOR A WRIT OF CERTIORARI

D.R., by his parents and legal guardians, M.R. and B.R., respectfully petitions for a writ of certiori to the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The unreported opinion of the Court of Appeals is reproduced at page A-1 of the Appendix to this Petition. The unreported Order of the Court of Appeals denying appellees' petition for rehearing in banc is reproduced at page A-13. The opinion of the United States District

Court for the District of New Jersey, reported at 838 F. Supp. 184 (D.N.J. 1993), is reported at page A-14.

JURISDICTION

This Court, as well as all lower courts involved with this case, has subject matter jurisdiction over a dispute involving the special education of a handicapped pupil under the IDEA pursuant to 20 U.S.C.A. §1415(e)(1)&(2).

Petitioners seek review of the judgment of the United States Court of Appeals for the Third Circuit entered March 26, 1997. The Third Circuit denied a request for rehearing by Order dated April 22, 1997.

The case at bar involves the enforceability of an agreement resolving a dispute concerning the IDEA. That statute and the corresponding regulations (34 C.F.R. 300, et seq.) are lengthy but do not address the topics of settlements or their enforceability, and therefore are not included in the Petition.

STATEMENT OF THE CASE

The key facts of the case are not in dispute. Matt and Barbara Rosenberg are the parents and legal guardians of Petitioner, Daniel Rosenberg, a multiply handicapped student who attended special education day classes provided by Respondent, East Brunswick Board of Education. Believing that their son was not making educational progress in the day program, the Rosenbergs unilaterally placed Daniel residentially at the Benedictine School in Ridgley, Maryland, and instituted an action pursuant to the New Jersey regulatory procedures implementing the federal IDEA to compel East Brunswick to undertake placement. N.J.A.C. 6:28-1, et seq.

The parties settled the matter during a mediation conference on February 3, 1992, with East Brunswick agreeing to pay $27,000

(prorated) of the $30,000 annual cost for the 1991-92 school year, and 90% of "any increase over the 1991-92 rate" for the 1992-93 school year.

After the agreement was signed, Benedictine determined that one-to-one aides were necessary in order for Daniel to continue in the program for the 1992-93 school year This increased the annual cost of the program by roughly $30,000 to $60,000. When the district refused to pay 90% of this increase, the parents instituted another action under the IDEA. Ultimately, the New Jersey Office of Administrative Law ("OAL") determined that the mediation agreement absolved East Brunswick of responsibility for the cost of the one-to-one aides. The parents then brought an action in Federal District Court.

On November 23, 1993 the District Court ruled that under the agreement East Brunswick was not responsible to pay for the one-to-one aides. However, the District Court further determined that the agreement could be set aside if three factors were present: (1) that "the aide is necessary in order to meet the standards of a free and appropriate public education;" (2) that the need for the aide arises as the result of a "change in circumstances" occurring after the agreement was entered; and (3) that issue was raised in a timely manner. D.R. by M.R. v. East Brunswick Bd. of Educ., 838 F. Supp. 184, 193-95 (D.N.J. 1993).

Following remand, the case was tried before the OAL and a decision in favor of East Brunswick was issued on July 12, 1994. In that decision the OAL ruled that although the issue had been raised in a timely manner, and although the aides were necessary in order to provide Daniel with an appropriate education, there had been no change in circumstances.

In response to the OAL decision, the parents filed a second complaint in District Court. On August 4, 1995, the District Court overturned the decision of the OAL, ruling that a change in circumstances had indeed occurred after the agreement was signed

which compelled the addition of the one-to-one aides, and that such aides were necessary in order for Daniel to receive an appropriate education.

East Brunswick then appealed to the Court of Appeals for the Third Circuit. On March 26, 1997, a majority of the panel, by a vote of two to one, reversed the decision of the District Court. Its holding turns exclusively on the binding nature of settlements. (Appendix at A-8)

> Once a school board and the parents of a disabled child finalize a settlement agreement ... the parents should not be allowed to void the agreement merely because the total cost of the program subsequently increases. A party enters a settlement agreement at least in part, to avoid unpredictable costs of litigation in favor of agreeing to known costs. Government entities have additional interests in settling disputes in order to increase the predictability of costs for budgetary reasons.
>
> We are concerned that a decision that would allow parents to void settlement agreements when they become unpalatable would work a significant deterrence contrary to the federal policy of encouraging settlement agreements.

On April 22, 1997, the Third Circuit denied a request for rehearing.

REASONS GRANTING THE WRIT

While the above cited language of the Circuit Court is sound in terms of being a general rule, it fails to take into account the "ambitious federal effort [manifest in the IDEA] to promote the education of handicapped children." Board of Education v. Rowley, 458 U.S. 176,

179 (1982). The majority would not allow parents to set aside an agreement that is "unpalatable." Yet there are times when an "unpalatable" agreement will mean that a child with a disability will not receive an appropriate education unless the agreement can be set aside. Unlike the District Court, the panel's decision includes no exception to accommodate a result that would deny a child an appropriate education[1]. Further, the panel wrongly allows the interests of school districts to have "predictability" for budgetary reasons to override (in all cases) the interests of handicapped pupils.

The facts of the case at bar illustrate why this Court should not let stand an inflexible rule regarding settlement agreements. The cost of Daniel's program doubled from one school year to the next, because Benedictine determined he needed more intensive staffing in order to learn. If the Rosenbergs did not have the resources to bear the additional $30,000 a year cost themselves while pursuing this litigation, D.R. would not have been able to attend school. Such a harsh result is permissible in typical business dealings where the chief motive of the parties is profit, but here it would run directly contrary to the IDEA, and the notion of providing each handicapped child with an appropriate education.

The dissent (as well as the District Court below) recognized this (Appendix at A-11):

> The District Court held that IDEA creates certain rights to educational assistance that cannot be waived by the guardians of a handicapped child and certain duties that cannot be bargained away by school boards. I agree and I would affirm the judgment of the District Court.

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[1] Although the D.R. Court states that "compelling policy reasons may require a different conclusion" in a future case, it never articulates what such reasons would be. Slip op at 9.

Clearly, to accommodate the tension between a public policy which favors the binding nature of settlement agreements and the mandate of the IDEA to ensure an appropriate education, the Court should reconsider the Circuit Court decision, and permit an exception along the lines indicated by the dissent and the District Court. When circumstances change so that the enforcement of a settlement agreement would not only be unpalatable but also deny a child an appropriate education, parents should be allowed to set aside the agreement. This would ensure fairness in the case at bar and in future cases as well.

In preparing this Petition, counsel has attempted to obtain figures regarding the number of IDEA disputes brought pursuant to 20 U.S.C.A. §1415(e) that are settled each year in New Jersey. Staff from the Office of Special Education Programs within the New Jersey Department of Education (NJDOE) advise that such statistics are not published. However, NJDOE reports that for the fiscal year beginning July 1, 1995, 1401 disputes were filed in New Jersey under the IDEA. Of these, 299 were settled as the result of mediation, and another 133 were settled after transmittal to OAL. Since the OAL disposed of only 143 by way of a decision[2], the remaining cases were either abandoned or settled informally. In any event there appear to be a substantial number of cases settled each year, and presumably the New Jersey experience is consistent with practice nationally.

It would be only speculation to argue that an ironclad rule like that adopted by the D.R. Court would have a chilling effect on settlements. However, it is accurate to say that the education of each handicapped child is important, and that a large number of disputes each year are resolved by settlement. Therefore, a decision by a Circuit

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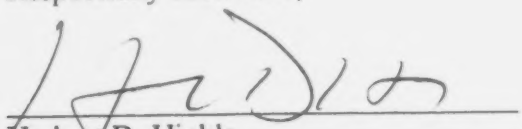
[2] This figure includes cases which the OAL issued a decision approving a settlement. Therefore, the number of actual adjudications is even smaller than 143.

Court will have a significant impact on a large number of important cases in the future, and an unfair decision -- as Petitioner believes the case at bar to be -- presumably will have a negative impact on those cases. Thus the case at bar will be of exceptional importance, not only to the Rosenbergs, but to a large number of children with disabilities.

CONCLUSION

For the foregoing reasons this Court should grant a writ of certiorari.

Respectfully submitted,

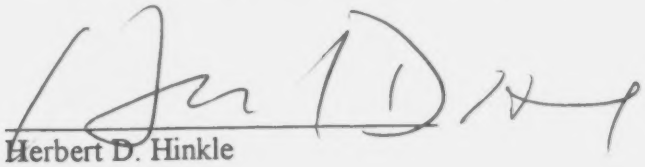


Herbert D. Hinkle
Attorney for Petitioner

Dated: 5/2/97

CERTIFICATION

I, Herbert D. Hinkle, hereby certify that I have been admitted to practice before the United States Supreme Court as of April 23, 1984.



Herbert D. Hinkle

Dated: 5/2/97

APPENDICES

Filed March 26, 1997

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-5634

D.R., by his parents and guardians M.R. and B.R.

v.

EAST BRUNSWICK BD. OF EDUC.

Appellant

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil Action No. 94-cv-04167)

Argued June 5, 1996

Before: SCIRICA and ROTH, *Circuit Judges*
and O'NEILL,[1] *District Judge*

(Opinion Filed: March 26, 1997)

Herbert D. Hinkle, Esq.
(Argued)
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Attorney for Appellee

---

1. Honorable Thomas N. O'Neill, Jr., United States District Court Judge for the Eastern District of Pennsylvania, sitting by designation.

Martin R. Pachman, Esq. (Argued)
Martin R. Pachman, P.C.
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Freehold, NJ 07728

Attorney for Appellant

OPINION OF THE COURT

ROTH, *Circuit Judge*:

This action was brought before the United States District Court for the District of New Jersey pursuant to the Individuals with Disabilities Education Act ("the IDEA" or "the Act"), 20 U.S.C. § 1401 *et seq.* It raises an important question regarding the enforceability of settlement agreements made between parents and school boards with the intent of enforcing the IDEA. On appeal, the East Brunswick Board of Education ("the Board") challenges the district court's order granting summary judgment against it. The district court held the Board liable for the cost of providing personal aides for D.R., a disabled person, pursuant to the requirements of the IDEA. The Board claims that the district court erred when it set aside a binding settlement agreement voluntarily entered by the parties. The district court acknowledged that enforcement of the settlement agreement would have required it to reach an opposite conclusion.

We review the district court's decision granting summary judgment *de novo*, "applying the same standard as the district court." *Pennsylvania Coal Ass'n v. Babbitt*, 63 F.3d 231, 236 (3d Cir. 1995); *see W.B. v. Matula*, 67 F.3d 484, 493 (3d Cir. 1995) (applying plenary review standard to summary judgment order in context of IDEA dispute). In making this *de novo* review, we recognize that we must give "due weight" to the underlying state administrative proceedings. *Board of Education v. Rowley*, 458 U.S. 176, 206 (1982). The Third Circuit has interpreted the Supreme Court's instruction in *Rowley* to require that a court "consider — although not necessarily to accept — the administrative fact findings." *Carlisle Area School v. Scott*

P., 62 F.3d 520, 529 (3d Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S.Ct. 1419 (1996). In addition, we must "view the underlying facts and all reasonable inferences therefrom in the light most favorable to the party opposing the motion." *Babbitt*, 63 F.3d at 236.

The district court had subject matter jurisdiction over the appeal from a final decision by an administrative law judge ("ALJ") pursuant to 20 U.S.C. § 1415(e)(1) & (2). We have jurisdiction to review the district court's final order granting summary judgment pursuant to 28 U.S.C. § 1291.

We conclude that the settlement agreement was improperly voided by the district court. On the facts of this particular case, the settlement agreement was voluntarily and willingly entered by the parties. It is therefore a binding contract between the parties and should have been enforced as written. Pursuant to the terms of the agreement, the parents of the child are responsible for all additional services not contemplated by the parties at the time of settlement. We will therefore reverse the opinion of the district court and grant summary judgment in favor of the Board. However, we emphasize that our holding is limited to the facts of this case and should not be read to extend beyond this case and this agreement.

I.

D.R. is a multiply handicapped individual classified by the New Jersey Board of Education as in need of special education. He was diagnosed at age two with Athetoid Ataxic Cerebral Palsy and moderate retardation. D.R. is now twenty-one years old, but his adaptive behavior is estimated to be at the preschool level. The parties agree that D.R. has difficulty performing simple daily tasks by himself. He has difficulty walking, dressing, and toileting without assistance. In the classroom, he often regresses into a hypnotic rocking behavior and must be constantly monitored by an assistant in order to engage him in classroom activity.

At age 4, D.R. began attending day school at the Cerebral Palsy Center ("CPC") in New Jersey, where he remained until January of 1992. While at CPC, D.R. resided with his

parents in East Brunswick, New Jersey. During the first semester of the 1991-92 school year, D.R.'s parents became convinced that he was not progressing at CPC and should be enrolled in a residential program. In December 1991, D.R.'s parents filed a petition with the New Jersey Department of Education requesting a due process hearing under the IDEA. The petition alleged that the CPC program was not appropriate for D.R. and that he would benefit from a transfer to the Benedictine School, an out-of-state residential school in Ridgely, Maryland.

The Board, however, disagreed that residential placement was necessary for D.R. His parents then in early January 1992 unilaterally placed him at the Benedictine School. The Benedictine School informed D.R.'s parents at that time that their son's acceptance in the program was on a "trial basis" that would last for five weeks. They were told that the proposed program might be modified depending on D.R.'s adaptation to his new circumstances. The Board now complains that it was never informed of the "trial" nature of D.R.'s acceptance at Benedictine nor that the program in which he was placed was subject to modification.

Before D.R.'s trial period was complete, his parents and the Board met at a mediation conference and entered a settlement agreement. The parties agreed that:

1) The East Brunswick Board of Education will compensate placement costs at the Benedictine School for D.R. at an annual rate of $27,500 prorated for the balance of the 1991-2 school year including summer of 1992 and beginning January 1, 1992;

2) For the 1992-93 school year the Board will contribute 90% of any increase over the 1991-92 rate.

3) The Board will be absolved of any other or further costs based upon this placement, related service, or transportation in connection therewith.

App. 408.

During D.R.'s first semester at Benedictine, the school "practically" provided one-to-one assistance. Classes were

small in size, with a high ratio of assistants and teachers to students; weekend and residential staff was able to provide the personal help that D.R. needed with daily functions. Later in the adaptation process, however, the school felt that it could not continue to expend such resources on D.R. without neglecting its other students. The school informed D.R.'s parents that D.R. would not be allowed to re-enroll for the 1992-93 school year unless personal aides were provided.

In April of 1992, the Board received a cost estimate from the Benedictine School for the 1992-93 school year. The tuition totalled $62,487 — more than double the amount provided by the settlement agreement. In addition to the amount that the Board had agreed to pay in 1992-93, the estimate charged the Board for the services of a special classroom aide and a special residential aide, each at a cost of $16,640.

The Board refused to pay any portion of the cost of the personal aides. It asserted that, under paragraph 3 of the settlement agreement, the cost of the aides were "related service[s]" for which the Board was not liable. D.R.'s parents disagreed and requested a hearing before a New Jersey Administrative Law Judge. They sought an order that D.R. was in need of residential placement, that personal aides were necessary, that the current placement at Benedictine was appropriate, and that the Board was required to pay for the cost of the placement and the necessary aides.

At the hearing, the Board moved for dismissal on grounds that the settlement agreement was binding and that under the agreement the Board was not liable for the cost of the aides. The ALJ agreed. She dismissed D.R.'s petition, finding the settlement agreement to be binding and determinative.

D.R.'s parents did not appeal this ruling but instead requested a hearing before the New Jersey Department of Education. In response, the Board argued that only a few weeks earlier, the same parties debated the same issues before a different ALJ who had dismissed the petition. The ALJ agreed with the Board and concluded that D.R.'s second petition was barred by the doctrine of res judicata.

D.R.'s parents appealed the ALJ's decision barring their claim on grounds of res judicata to the U.S. District Court for the District of New Jersey. Both parties moved for summary judgment. On the basis of the pleadings and briefs submitted, the court concluded that the settlement agreement was binding. *D.R. by M.R. v. East Brunswick Bd. of Educ.*, 838 F. Supp. 184, 195 (D.N.J. 1993). It found that the language of the agreement was unambiguous and required only that the Board pay for 90% of any increase in the cost of an array of services provided the previous year. Because personal aides were not within the array of services previously provided, the district court held that the Board would not be liable for the cost of the aides under the terms of the settlement agreement, *unless* D.R.'s personal circumstances had changed since the parties entered the agreement. *Id.* at 190-91 & 194.

The district court therefore remanded the case to an ALJ to determine whether D.R.'s personal circumstances changed following the closing of the agreement. *Id.* at 195-96. If the ALJ found that D.R.'s circumstances had changed such that the services provided by the agreement no longer satisfied the requirements of the IDEA, the court instructed that the agreement could not bind the parties and should be invalidated. *Id.* at 194. The Board would then be liable under the IDEA for the cost of the personal aides for the 1992-93 school year.

On remand, the ALJ first concluded that during the 1992-93 school year, one-to-one assistance was effectively provided by the School and was "educationally necessary and consistent with the IDEA." He then found that because D.R.'s disability had not changed, his "personal circumstances" had not changed. As a result, the ALJ again ruled in favor of the Board, holding that the settlement agreement was binding and that the Board was not liable for the cost of the additional aides.

D.R.'s parents appealed this decision to the district court, seeking reversal of the ALJ's order. Again, both parties moved for summary judgment. The district court concluded that the record supported the ALJ's finding that a one-to-one aide was "educationally necessary and consistent with the IDEA." Mem. Op. at 13. It held that this finding dictated

the outcome of the case. Applying the Supreme Court's interpretation of the IDEA, the district court concluded that states receiving federal funds under the Act must provide services that are "necessary to permit the child 'to benefit' from the instruction." Mem. Op. at 5 (quoting *Rowley*, 458 U.S. at 188-89). The district court thus concluded that New Jersey could not refuse to provide educationally necessary services. Such necessary services are the right of the disabled individual and cannot be waived by a contract to provide something less.

As a result, the district court held the Board liable for the cost of the personal aides for the 1992-93 school year, which amount was to be established by agreement between the parties. Following the judgment, D.R.'s parents moved for an award of attorneys' fees and related costs as "prevailing parties" in the litigation. A few days later, the Board filed a notice of appeal. The Board then moved to stay the motion for attorneys' fees filed by D.R.'s parents, pending the outcome of this appeal. D.R.'s parents did not oppose the Board's motion, and the court granted a stay on the matter of attorneys' fees and costs.

II.

The district court set aside the settlement agreement based on its finding that D.R.'s circumstances had changed since the parties entered the agreement. In finding changed circumstances, the district court rejected the conclusions of the state administrative law judge. The court held that, because D.R.'s circumstances had changed, the personal aides had become "educationally necessary" for him to obtain an appropriate education as guaranteed by the IDEA. The court found that the settlement agreement improperly excused the Board from its duty to provide educationally necessary services, and it therefore concluded that the agreement did not meet the IDEA's mandatory standards. As a result, the district court invalidated the agreement and placed liability for the cost of the personal aides on the Board.

We believe that the district court erred when it found that D.R.'s circumstances changed following settlement. Instead,

we find that the only change that occurred in this case appeared on the bill sent by the Benedictine School to the Board. There was no change in D.R.'s individual circumstances; he continued to need individual assistance in toileting, dressing, grooming, and eating. The only circumstance that changed was that Benedictine decided that its staff could not maintain the level of individualized attention that D.R. was receiving at the negotiated price. The School decided that additional help was needed to deal with D.R.'s *unchanged* condition, increasing the total cost of services provided by the School.

Once a school board and the parents of a disabled child finalize a settlement agreement and the board agrees to pay a certain portion of the school fees, the parents should not be allowed to void the agreement merely because the total cost of the program subsequently increases. A party enters a settlement agreement, at least in part, to avoid unpredictable costs of litigation in favor of agreeing to known costs. Government entities have additional interests in settling disputes in order to increase the predictability of costs for budgetary purposes.

We are concerned that a decision that would allow parents to void settlement agreements when they become unpalatable would work a significant deterrence contrary to the federal policy of encouraging settlement agreements. *See McDermott, Inc. v. AmClyde*, 511 U.S. 202, ___, 114 S.Ct. 1461, 1468 (1994) ("Public policy wisely encourages settlements."). Settlement agreements are encouraged as a matter of public policy because they promote the amicable resolution of disputes and lighten the increasing load of litigation faced by courts. In this case, public policy plainly favors upholding the settlement agreement entered between D.R.'s parents and the Board.

We agree that reaching a settlement agreement during mediation, rather than during litigation, does not lessen the binding nature of the agreement on the parties. *See D.R. by M.R.*, 838 F. Supp. at 190. When the parties entered the settlement agreement at issue in this case, they entered a contract. *In re Columbia Gas System, Inc.*, 50 F.3d 233, 238 (3d Cir. 1995) ("In a nonbankruptcy context, we have treated a settlement agreement as a contract."); *see also*

Halderman v. Pennhurst State School & Hosp., 901 F.2d 311, 318 (3d Cir.), *cert. denied*, 498 U.S. 850 (1990); *New York State Elec. & Gas Corp. v. F.E.R.C.*, 875 F.2d 43, 45 (3d Cir. 1989). We will therefore enforce the agreement as a binding contract voluntarily entered by both parties.[2]

When D.R.'s parents appealed the ALJ's decision to dismiss on grounds of res judicata, the district court noted that, if D.R.'s circumstances had not changed since settlement, the settlement agreement was binding on the parties. *D.R. v. M.R.*, 838 F. Supp. at 195. It also held that if the contract was to be enforced as binding, the terms of the agreement were "clear and unambiguous." *Id.* at 190. Under the agreement and as a matter of law, for the 1992-93 school year, the Board was responsible for 90% of any increase in the cost of services provided during the 1991-92 school year. The additional services of personal aides were not provided during the 1991-92 term. Nor was the cost of personal aides contemplated by the parties in negotiating the agreement. Thus, the district court held that, if enforced, the contract clearly required that D.R.'s parents pay the cost of the aides' services provided during the 1992-93 school year.

We agree that this is the proper reading of the settlement. Because we conclude that D.R.'s circumstances have not changed and that the settlement agreement is therefore binding on the parties, we hold that the district court's reading of the "clear and unambiguous" terms of the agreement applies. The Board is not liable for the cost of the personal aides provided for D.R. during the 1992-93 term. As a consequence, it is not necessary for us to remand the case for the district court's determination.[3]

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2. We emphasize again, however, that in other cases where different facts are at issue, compelling public policy reasons may require a different conclusion.

3. Unlike the situation in *Miller Tabak Hirsch v. Commissioner of Internal Revenue*, 101 F.3d 7 (2d Cir. 1996), cited by the dissent, there is no contention here that the settlement agreement violated federal law when it was executed. The issue before the district court was change of circumstances; if D.R.'s circumstances had not changed, the agreement would be valid. Moreover, the settlement here resolved the dispute

Finally, it is apparent that the motion filed by D.R.'s parents seeking attorneys' fees and costs as prevailing parties must fail. "[A] plaintiff 'prevails' when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Farrar v. Hobby*, 506 U.S. 103, 112 (1992); *see also Wheeler v. Towanda Area School District*, 950 F.2d 128, 131 (3d Cir. 1991); *E.M. v. Millville Bd. of Educ.*, 849 F. Supp. 312, 316 (D.N.J. 1994). D.R.'s parents have not prevailed on their claim, nor have they obtained the relief they sought. They are thus not entitled to an award of attorneys' fees or costs under § 1415 of IDEA. 20 U.S.C. § 1415(e)(4)(B).

III.

For the above reasons, we will reverse the district court's order, and we will grant summary judgment in favor of the appellant.

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between the parties of whether D.R. required residential or day care. The fact that the Board ceded its position that day care was adequate under IDEA by agreeing to a fixed amount of residential care does not mean that the Board was not providing funding that was sufficient to furnish day care for D.R. that would satisfy IDEA. If this type of settlement is not permitted, we will deprive educators of needed room to compromise in resolving IDEA disputes.

SCIRICA, *Circuit Judge*, Dissenting.

I respectfully dissent.

Both the administrative law judge and the district court found that one-on-one assistance was "educationally necessary" for D.R.'s development. Although the ALJ found D.R.'s personal circumstances had not changed, the district court reversed, holding the settlement could not satisfy IDEA.

Whether or not the change in Benedictine's funding policy should constitute a "change in circumstances" necessitating revision of the original agreement, Benedictine's refusal to afford the same personal care for the same tuition charge meant D.R. no longer could receive the requisite amount of care contemplated under the settlement agreement.

The district court held that IDEA creates certain rights to educational assistance that cannot be waived by the guardians of a handicapped child and certain duties that cannot be bargained away by school boards.[1] I agree and I would affirm the judgment of the district court.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

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1. A settlement agreement that violates a federal public policy or federal statute may be invalidated. *Miller Tabak Hirsch & Co. v. Commissioner of Internal Revenue*, 101 F.3d 7, 10 (2d Cir. 1996). Because the state of New Jersey receives IDEA federal grant funds it must provide its handicapped citizens with the requisite educational assistance under the Act. *See Bd. of Ed. of East Windsor Regional Sch. Dist. v. Diamond*, 808 F.2d 987, 991 (3d Cir. 1986); *Equal Employment Opportunity Commission v. Astra USA, Inc.*, 94 F.3d 738, 744-45 (1st Cir. 1996).

APPENDIX B

[Filed: April 22, 1997]

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-5634

D.R., BY HIS PARENTS AND LEGAL GUARDIANS,
M.R. and .B.R.,

Appellee,

V.

EAST BRUNSWICK BOARD OF EDUCATION,

Appellant.

Appeal from the United States District Court
for the District of New Jersey

SUR PETITION FOR REHEARING EN BANC

(April 22, 1997)

Before SLOVITER, Chief Judge BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, and McKEE, Circuit Judges and O'Neill[3], District Judge

SUR PETITION FOR HEARING IN BANC

The petition for rehearing filed by appellee in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is DENIED. Judges Becker and Scirica would have granted rehearing.

ENTERED FOR THE COURT:

/ s / [Illegible]
United States Circuit Judge

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[3] Honorable Thomas N. O'Neill, Jr., United States District Court Judge for the Eastern District of Pennsylvania, voted as to panel rehearing only.

APPENDIX C

[Filed November 23, 1993]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

No. 93-560

D.R., BY HIS PARENTS AND LEGAL GUARDIANS,
M.R. and B.R.,

Plaintiffs,

V.

EAST BRUNSWICK BOARD OF EDUCATION,

Defendant.

Review was sought of administrative law judge's decision upholding settlement agreement reached in Individuals with Disabilities Act (IDEA) action concerning costs of special education student's placement in residential facility. The District Court, Wolin, J., held that: (1) settlement agreement was ambiguous in that it required board of education to contribute 90% of any increase in the costs for the array of services provided for the previous school year and since aide was not within this array of services, board, pursuant to agreement, was not required to pay for aide; (2) agreement

would not be voided, absent evidence that there was a mutual mistake or lack of mutual assent with respect to aide; and (3) agreement was binding and would not be set aside unless student's circumstances changed, whereby enforcing terms of settlement would violate IDEA. So ordered.

Herbert D. Hinkle, Lawrenceville, NJ, for Plaintiffs.
Martin R. Pachman and Lisa A. Sanders, Freehold, NJ, for Defendants.

OPINION

WOLIN, District Judge.

This matter was opened to the Court by plaintiff, D.R., pursuant to Federal Rule of Civil Procedure 56 for an order granting plaintiff summary judgment and was responded to by way of a cross-motion for summary judgment by defendant, East Brunswick Board of Education (the "Board"). Having reviewed all the papers and briefs, filed, the Court denies plaintiff's motion and defendant's cross-motion for summary judgment, and remands the matter to the Office of Administrative Law.

BACKGROUND

The parties contend that there are not material facts in dispute. D.R. is an eighteen year old multiply handicapped student who has been classified by defendant as in need of special education. Administrative Judge ("ALJ") 12/14/92 Opinion, p.3. D.R. attended Middlesex County Cerebral Palsy Center-Lakeview School for the 1989-1990 and 1990-1991 school years. Believing that he was not making progress,

during the 1991-1992 school year, D.R.'s parents requested change in placement to an out-of-state residential school, the Benedictine School, located in Ridgley, Maryland. When the Board disputed the need for residential placement, D.R.'s parents unilaterally placed him at Benedictine in early January, 1992, and simultaneously instituted an action pursuant to the Individuals' with Disabilities Education Act ("IDEA" or "the Act"). 20 U.S C.A. §1401, et seq. At a mediation conference held on February 3, 1992, the parties entered into a settlement agreement ("Agreement"). The Agreement provides in relevant part:

> At the mediation conference held in the above-cited matter the parties agreed to following:
>
> (1) The East Brunswick Board of Education will compensate placement costs at the Benedictine School for D.R. at an annual rate of $27,500 prorated for the balance for the 1991-1992 school year including summer of 1992 and beginning January 1, 1992;
>
> (2) For the 1992-1993 school year, the Board will contribute 90% of any increase over the 1991-1992 rate; and
>
> (3) The Board will be absolved of any other or further costs based upon this placement, related services, or transportation in connection herewith.

By entering into this agreement, the Board was responsible for paying $27,500 prorated toward the $30,000

annual cost for 1991-1992[4]. Several months after the Agreement was signed, the Board received an estimated 1992-1993 Benedictine School program cost for D.R. The costs totaled $62,487 and included a provision for the services of a one-to-one aide for D.R. during the waking hours. The Board refused to pay any portion of the cost associated with the aide and D.R., by his parents, requested a hearing pursuant to N.J.A.C. 6:28-2.

In that action, D.R. asserted that (i) since being placed at Benedictine, the staff there determined that D.R. required the services of a one-to-one aide in order to benefit from the program, and that unless the aide is provided D.R. could not continue in the program; and (ii) D.R. is in need of both a residential program and a one-to-one aide in order to prevent serious regression. As the Board had refused to pay for the aide, D.R. sought an order finding *inter alia* that he was in need of residential placement and a one-to-one aide, that the current placement along with the provisions of the aide were appropriate and that the Board was required to pay for the cost of an aide.

At the start of the hearing before an Administrative Law Judge of the State of New Jersey, counsel for defendant made an oral motion for dismissal, arguing that under the terms of the February 3 Agreement the Board was not bound to pay for the aide. The Honorable Kathleen M. Duncan, Administrative Law Judge, decided to bifurcate the proceeding. Tr. 4:1-10. In the first stage of the hearing, conducted October 26, 1992, the administrative law judge stated that she would hear three issues:

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[4] The annual cost of the program included occupational therapy, physical therapy and speech and language therapy.

(i) is the Agreement binding between the parties; (ii) if yes, then is the Board required to pay 90% of the cost of a one-to-one aide; and (iii) has the Board satisfied its burden pursuant to IDEA. *Id.* The second stage of the proceeding, which apparently never occurred, was to deal with the substantive testimony on *inter alia* the one-to-one aide. Tr. 5:4-18. During the first stage, the ALJ conducted a limited hearing on October 26, 1992, wherein D.R.'s father and Susan Preston, Supervisor of Special Education for the Board, were permitted to testify regarding their understanding of the Agreement.

The outcome of the first stage of the proceeding is outlined in a letter from the ALJ dated November 5, 1992. The November 5th letter advising the parties of the outcome of the hearing, only lists two conclusions -- that the Agreement was a legally enforceable contract between the parties and that pursuant to the Agreement the Board's obligations for 1992-1993 school year were limited to 90% of the increase over the 1991-1992 rate for education and basic related services, related residential services, room and board, including physical therapy, occupational therapy, and speech. This letter advised:

> A written opinion discussion these conclusions will be issued either forthwith or following

> additional evidence on the merits of the I E.P [5], placement, and residential costs, depending upon how you decide to proceed. If the parents determine not to pay the additional costs for 1992-1993 or they cannot pay the additional costs which apparently Benedictine requires for continued enrollment for 1992-1993. I will need something in writing from them so stating. They will then be in breach of the agreement and the agreement becomes a nullity, and the Board is relieved of further performance (and may be entitled to reimbursement). In that event, the case can continue ... with the Board moving forward on all issues. If you wish to appeal my ruling on the settlement agreement before proceeding further, I will issue a decision now, dismissing the petition and articulating my reasons.

Plaintiff decided to file a motion for reconsideration concerning the Agreement and a formal opinion was issued on December 14, 1992. The opinion states that a "final decision" granting the Board's motion "should be issued before any further proceedings with respect to the merits of the issues."

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[5] I.E.P. is the acronym for individualized education program. The I.E.P. is a written statement outlining the education placement and goals for the child. 20 U.S.C. §1401 (20). It is developed by a case study team, the child's parents, a teacher with the knowledge of the student's performance, the student (if appropriate), and a representative of the private facility, if the student has been privately placed. See Fuhrmann v. E. Hanover Bd. of Ed., 93 F.2d 1031, 1035 (3d Cir. 1993).

12/16/92 ALJ opinion, p.2.

By way of a letter dated November 16, 1992 (sic), D.R.'s attorney filed a second action alleging that D.R. is in need of ... the one-to-one aide," and contending that the first action "did not examine [D.R.'s] educational needs" but "dealt only with the [settlement] agreement." See Office of Administrative Law Decision, EDS 10062-92, Dkt. No. 93-5095 ("1/13/93 ALJ Opinion"). The Board moved to dismiss D.R.'s second claim as barred by operation of the doctrine of res judicata. In an opinion dated January 19, 1993, the Board's motion was granted. This opinion concluded that D.R.'s claim was the same as that decided in December, 1992 and that because it was already correctly decided that the Agreement was valid and enforceable, and the that claim was governed by and barred by the Agreement, the current petition was barred by res judicata. Id.

DISCUSSION

The motion for summary judgment is intertwined with the decision of the ALJ, pursuant to 20 U.S.C. §1415(e)(2). In order for the Court to have subject matter jurisdiction in and IDEA matter, a final decision must be rendered in an administrative process. 20 U.S.C. § 1415 (e)(1), (2). The ALJ decision of December 14, 1992, upholding the Agreement, clearly states that it is final pursuant to 20 U.S.C. § 1415(e)(1) and appealable to this Court.

This Court is called upon to make an independent determination of the issues before it, giving due weight to the administrative proceedings. Geis v. Board of Education, 774 F.2d 575, 583 (3d Cir. 1985). Such a review, however, is not

an invitation for this Court to substitute its own notions of sound education policy for those state and local school officials. Board of Education v. Rowley, 458 U.S. 176, 206-07, 102 S.Ct. 3034, 3051, 73 L.Ed.2d. 690 (1982). As set forth in 20 U.S.C. §1415 (e)(2), the starting point of review is this Court's receipt of the record of the administrative proceedings, followed by the hearing or additional evidence at the request of a party. Thereafter, applying a preponderance of the evidence standard, this Court shall grant such relief as it determines is appropriate. Wexler v. Westfield Bd. of Ed., 784 F.2d 176, 180 (3d Cir.), cert. denied, 479 U.S. 825, 107 S.Ct. 99, 93 L.Ed.2d. 49 (1986).

[1,2] With respect to the motions sub judice, summary judgment shall be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); see Hersh v. Allen Products Co., 789 F.2d 230, 232 (3d Cir. 1986). In making this determination, a court must draw all reasonable inferences in favor of the non-movant. Meyer v. Riegel Corp., 729 f.2d 303, 807 n. 2 (3d Cir. 1983), cert dismissed, 465 U.S. 1091, 104 S.Ct. 2144, 79 L.Ed.2d. 910 (1984). Whether a fact is "material" is determined by the substantive law defining the claims. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986); United States v. 225 Cartons, 871 F.2d 409, 419 (3d Cir. 1989).

[3] "[A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Anderson, 477 U.S. at 249, 106 S.Ct. at 2511.

Summary Judgment must be granted if no reasonable trier of fact could find for the non-moving party.

1. To Be Binding or Not to Be Binding?

At issue is the Agreement of February 3, 1992 with respect to the placement of D.R., a special education student. D.R. submits that the decision of the administrative agency which held that pursuant to the Agreement the Board is responsible for only 90% of the increase in costs over the 1991-1992 school year was erroneous. D.R. asserts that the agreement either (1) requires the Board to pay $27,500 plus 90% of the increase in costs for the 1991-1992 school year, including the cost of an aide, or, alternatively, (2) is not binding with respect to the 1992-1993 school year given IDEA. On the other hand, the Board argues that the Agreement is a legally binding settlement agreement which D.R.'s parents subsequently wish to abrogate because they no longer want to be bound to its economic terms.

A. Settlement and Mediation

[4,5] It is well settled that settlement agreements to a lawsuit form a contract between parties. Nolan v. Lee Ho, 120 N.J. 466, 472, 577 A.2d 143 (1990). Plaintiff asserts that because the Agreement was reached during mediation it is not a binding resolution of a lawsuit. The Court concurs with the Administrative Law Judge that such an assertion is not backed by either case law or logic. See Brief and Appendix of plaintiff ("plaintiff's brief"), Appendix pp. 73, 80.

The very purpose of the mediation process is to achieve settlement which would avoid the necessity of litigation. That a

settlement achieved at mediation is indeed regarded as a disposition of the issues contained in the agreement is evidenced by the fact that many courts, including the Supreme Court, have found that settlement in IDEA cases is sufficiently final to constitute a legal resolution entitling attorney's fees. See, e.g., Farrar v. Hobby, ------ U.S. -----, -----, -----, 113 S.Ct. 566, 572-73, 121 L.Ed.2d 494 (1992); Eggers v. Bullitt County School District, 854 F.2d 892 (6th Cir. 1988); Shelly C. v. Venus Independent School District, 878 f.2d 862, 864 (5th Cir. 1989); cert denied, 493 U.S. 1024, 110 S.Ct. 729, 107 L.Ed.2d 748 (1990); Barlow-Gresham Union High School District No. 2 v. Mitchell, 940 F.2d 1280 (9th Cir. 1991).

[6] The fact that this Agreement was reached during mediation does not in and of itself diminish the effect of the Agreement, or make it any less of a binding contract. To so hold would create a hierarchy of settlement agreements where some are deemed binding while others are not determinable merely by whether they were reached during mediation or during litigation. Such a rule would create confusion and indefiniteness as tot he effect of a settlement agreement. Accordingly, it may have a chilling effect on the use of such agreements as parties would never know whether the matter was finally resolved.

For all the above reasons, the Court reject plaintiff's argument as meritless and finds that the Agreement is a binding final resolution of his action.

B. Construction of the Agreement

Plaintiff next asserts that the Agreement clearly requires the Board to pay $27,500 plus 90% of the increase of costs for

the 1991-1992 school year, including the cost of an aide. The Board argues that this interpretation of the Agreement is clearly erroneous and that the ALJ correctly decided that it does not obligate the Board to pay any amount towards the cost of an aide. The issue the Court now confronts is who should pay for the aide under the provisions of the Agreement.

[7-9] When a contract is plain and definite the construction of a contract is a matter of law. Air Master Sales Co. v. Northbridge Park Co-op, Inc., 748 F.Supp. 1110, 1114 (D.N.J. 1990). However, construction is not permitted or required when the language of the contract is plain, unambiguous and susceptible to only one interpretation. See Id. at 1115, citing Nevets C.M., Inc. v. Nissho Iwai American Corp., 726 F.Supp. 525, 533 (D.N.J. 1989), aff'd, 899 F.2d 1218 (3d Cir. 1990). When the contract is plain, unambiguous and susceptible to only one interpretation, the words contained therein will be give their "plain and ordinary" meaning. Nevets, 726 F.Supp. at 533, quoting Independent Oil Workers at Paulsboro, N.J. v. Mobil Oil Corp., 441 F.2d 651, 653 (3rd Cir. 1971); see also Goldberg v. Commercial Union Ins. Co. of N.Y., 78 N.J.Super. 183, 188, 188 A.2d 188 (App. Div. 1963). Consequently, "[i]t is not necessarily the parties' true intent, but the intent as expressed or apparent in the writing that controls." J.I. Hass Co., Inc. v. Gilbane Building Co., 881 F.2d 89, 92 (3rd Cir. 1989); see also Dome Petro. Ltd. v. Employers Mutual Liability Ins. Co., 767 F.2d 43, 47 (3rd Cir. 1985).

[10] The Agreement is clear and unambiguous. It must therefore be construed to mean what it says, giving the plaing and ordinary language its normal and usual meaning. Keeping in mind that D.R.'s parents and the East Brunswick Board of Education signed the Agreement, it must express their

intention.

Clearly and unambiguously Paragraph 2 of the Agreement stated:

> For the 1992-1993 school year the Board will contribute 90% of any increase over the 1991-1992 rate.

Plaintiff asserts that the reference to "any increase over the 1991-1992 rate" means that the Board would pay any increase in cost from the 1991-1992 school year to the 1992-1993 school year. That is, if the program rate for D.R. jumped from $30,000 to $50,000, then the Board would pay 90% of $50,000, with the parents paying the remaining 10%.

Plaintiff's reading of Paragraph 2, however, selectively incorporates some parts of the Agreement while ignoring others. Specifically, plaintiff wants the Court to incorporate Paragraph 1 which clearly binds the Board to contribute "an annual rate" of $27,500 towards the placement costs at Benedictine, but exclude Paragraph 3 which absolves the Board for "any other or further costs" for "related services, or transportation in connection" with Benedictine. The Court will not engage in such selective reading of the Agreement. We will examine the Agreement as a whole.

Taken collectively, Paragraphs 1 and 3 draw a ring around the services the Board was obliged to pay for during the 1991-1992 school year. The contents of this ring enumerated in the program cost sheet for the school year 1991-1992 which the Board received after the agreement was entered. See Office of Administrative Law Decision EDS 6529-92, December 14,

1992 ("12/14/92 OAL Opinion"), p. 4. As the program cost sheet showed these services were education and basic related services, related residential services, room and board. They included physical therapy, occupational therapy, and speech. Board's Brief p. 6. In light of the limiting language contained in Paragraph 3, this array of services, and they alone, comprised the 1991-1992 rate.

The testimony of D.R.'s father, M.R., at the administrative law hearing bears out this analysis. M.R. testified that the Board's responsibility in 1991-1992 was fixed at $27,500. Tr. 44-45. This amount did not include certain other costs related to D.R.'s placement, such as transportation costs which M.R. was wholly responsible for. Tr. 45:3-8; Tr. 46:11-16. Accordingly, M.R.'s testimony establishes that the Agreement delineated an array of services which the Board was assuming responsibility for in 1991-1992 and another array in which they were not.

The Agreement clearly links the Board's contribution for 1992-1993 to the 1991-1992 rate. Paragraph 2 refers to the 1991-1992 rate. It requires the Board to pay 90% of the increase from the 1991-1992 rate for the school year 1992-1993. Giving the plain and ordinary language of Paragraph 2 its normal and usual meaning, the Board was obliged to pay 90% for any increase in cost associated with these services, nothing more and nothing less. An aide was not one of the services enumerated in the program cost sheet for 1991-1992. The program cost sheet illustrates that it is a new service for 1992-1993, outside of the array covered in 1991-1992, as it is a separate line item. As the cost for an aide is outside of the array of services covered for 1991-1992, plaintiff's reading of the Agreement is an attempt not only to add additional services to

the program but also to attach the additional cost to the Board in direct contradiction to the Agreement.

However, plaintiff contends that Paragraph 3's limitations on the Board's responsibility concerns only the first school year, 1991-1992, but not the second, 1992-1993. The Court has examined Paragraph 3 and finds that it has no such language. In comparing the language of Paragraphs 1 and 2 to Paragraph 3, that Court finds that where the parties desired to reflect different obligations for the different school years, they so stated. Since Paragraph 3 does not contain any reference to the school years, it is clear that it was meant to apply to both years. The Court finds that plaintiff's argument is meritless.

For all the above reasons, the Court concludes that the Agreement is clear, unambiguous, and binding. Under the terms of the Agreement, the Board is responsible for paying $27,500 for the school year 1991-1992 for education and basic related services, related residential services, room and board, including physical therapy, occupational therapy, and speech and 90% of any increase in cost for these services. D.R.'s parents are responsible for paying the remaining 10% of any increase for these services and 100% for any and all other services, including the cost of the aide.

2. Rescission or Reformation of the Agreement

A. Mutual Mistake

[11] Plaintiff next asserts that the services of a one-to-one aide were not contemplated at the time the Agreement was executed there was no meeting of the minds and it is tantamount to mutual mistake. Plaintiff's Brief at p. 10.

Because both parties were mistaken at the time the Agreement was made, plaintiff submits, the Agreement is voidable.

[12-14] The Court first finds it necessary to differentiate between a meeting of the minds and a mutual mistake. The meeting of the minds required to make a contract requires the parties to mutually agree and assent to the substance and terms of it. Black's Law Dictionary 886 (5th ed. 1979). It is elementary that a contract cannot be made when there has been no common understanding and mutual assent to the terms of a contract. Driscoll v. State, Dept. of Treasury, 265 N.J.Super. 03, 513, 627 A.2d 1167 (1993); Knight v. New England Mutual Life Ins. Co., 220 N.J.Super. 560, 533 A.2d 55 (App. Div. 1987). Mutual mistake presumes that the parties have had a meeting minds but that at the time of contract both assumed the same misconception as to a basic assumption. See id. at 920; Bonnco Petrol, Inc. v. Epstein, 115 N.J. 599, 608-09, 560 A.2d 655 (1989); Lampley v. Davis Machine Corp., 219 N.J. Super. 540, 549-550, 530 A.2d 1254 (App. Div. 1987).

The facts of this case do no illustrate that there was any meeting of the minds on the subject of a one-to-one aide. The facts do not support the conclusion that D.R.'s parents were under the clear impression that the Agreement would require the Board to fund 90% of an aide and that the Board's impression was to the contrary. What they do demonstrate is neither party ever considered or discussed the item at the time the Agreement was entered. See Tr. 46:1-10. Likewise, there is no support for the conclusion that both parties were laboring under a common misconception.

As rescission or reformation of a settlement agreement is an extraordinary remedy which may be considered only upon demonstration by clear and convincing proof that the agreement was the result of inter alia mutual or no meeting of the minds, and as the facts clearly show that this is not a case of mutual mistake or lack of mutual assent, the Court must find that the Agreement can not be voided.

B. Rescission in Light of IDEA

Plaintiff contends that in light of Woods v. N.J. Dept. of Education, 796 F.Supp. 767 (D.N.J. 1992), the Agreement is not binding on the parents. In Woods, as here, the parents of an educationally handicapped child entered into a stipulation of settlement with the local board of education. The settlement was approved by a hearing officer who determined that the settlement resolved all issues in the case. Id. at 770. Under the terms of the settlement, the school board agreed to pay for the educational portion of residential care for nine months, beyond that the board was absolved of such costs, and the parents agreed to make no further demands upon the board for residential services. Id. at 770 n.

1. The parents then pursued funding for the residential care portion of the school through various state agencies. Id. at 770. When this proved unsuccessful, the parents moved to reopen the matter with the school board and the other agencies. Id. at 771.

The school board moved for summary judgment in view of the settlement agreement. In denying the board's motion to dismiss, the district court focused on the board's responsibilities to provide a free and appropriate education. That is, the court

apparently examined the settlement agreement in light of the statutory mandates of IDEA. While the Woods court did not delve into the specifics of IDEA and the school board's responsibility, the Court finds that t must supplement the Woods decision by making a brief digression to explain a school board's responsibilities and duties under IDEA.

[15] IDEA provides a comprehensive handicapped educational plan. See generally Board of Education v. Rowley, 458 U.S. 176, 179-84, 102 S.Ct. 3034, 3037-39, 73 L.Ed.2d 690; Oberti v. Board of Education, 995 F.2d 1204, 1213 (3rd Cir. 1993). Originally enacted as the Educational for All Handicapped Children Act in 1975, its goal is to ensure the disabled children receive appropriate educational services. Oberti, 995 F.2d at 1213 (citation omitted). IDEA provides federal assistance to participating states for the education of such special children. B.G. by F.G. v. Cranford Bd. of Education, 702 F.Supp. 1140, 1148 (D.N.J. 1988), aff'd, 882 F.2d 510 (3d Cir. 1989)[6]. To receive funds, states must have "in effect a policy that assures all children with disabilities the right to a free appropriate public education." 20 U.S.C.A. §1412(1).

[16, 17] The Supreme Court has held that a "free appropriate public education" consists of "educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child 'to benefit' from the instruction." Rowley, 458 U.S. 188-89, 102 S.Ct. at 3042. The interstitial detail of

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[6] New Jersey is a participating state, subject to the requirements of IDEA. See Lascari v. Bd. of Education, 116 N.J. 30, 560 A.2d 1180 (1989).

IDEA is reserved for the states, who have the right to exceed the federal minimum standards and provide greater protection and services for handicapped children. B.G., 702 F.Supp. at 1148. New Jersey has chosen to impose a higher standard of special education than the basic floor required by the Act. Lascari, 16 N.J. at 48, 560 A.2d 1180; Geis v. Board of Education, 774 F.2d 575, 583 (3d Cir. 1985). As a result, in New Jersey, local school boards are required to provide educational services according to how the student can best achieve success in learning. Id. at 583.

Accordingly, the key issue in Woods was whether residential placement was educationally necessary under IDEA. The court concluded that the board of education has a duty under IDEA and state law to provide disabled students with a free appropriate public education, including funding both the education and residential portion of the placement. Woods, 796 F.Supp. at 776. Where it was educationally necessary but the board refused to "pay for the total costs of such placement", the board of education denied the student free and appropriate public education. Id. Because whether residential placement was educationally necessary and thus whether the board abdicated its duty were fact questions, summary judgment was denied. Additionally, and most importantly to the present matter, the court concluded that the existence of a settlement agreement did not bar action against the school board demanding total funding of residential placement given the board of education's duty. Id. Hence, the Woods court found that notwithstanding a settlement agreement, the board was required to comply with the law.

[18] While both parties contend that the issue here is one of construction of the Agreement -- namely, to determine

who is responsible for paying for the one-to-one aide -- the Court believes that there is another issue which should also be addressed: Whether the one-to-one aide is educationally necessary. Id. at 772-774; Woods v. New Jersey Department of Education, ("Woods II"), 823 F.Supp. 254, 258 (D.N.J. 1993). D.R.'s educational rights entitle him to a program and services that will permit him to best achieve his educational success. B.G., 702 F.Supp. at 1156. Should it be determined that an aide is necessary in order to meet the standards of a free and appropriate education, a school board cannot discharge its duty by virtue of a settlement agreement. In light of Woods, a settlement agreement does not allow a school board to contract around or out of IDEA.

On the other hand, should it be determined that an aide is unnecessary, and thus that the school board is complying with the law, the Court will not allow parents of disabled students to ignore a settlement agreement with a view to constructing a new and better bargain. The Court concurs with the view espoused by defendants and the Administrative Law Judge: settlement agreements to a lawsuit usually form a contract between parties. Nolan, 120 N.J. at 472, 577 A.2d 143. Accordingly, the Court is sensitive to the possibility that a narrow reading of today's holding will tomorrow eliminate settlement agreements in special education cases.

In fact, plaintiff posits this exact argument. D.R. asserts that Woods allows parents of disabled children to virtually have carte blanche in disregarding settlement agreements. Plaintiff submits that Woods stands for the proposition that parents "always maintain[ ] a right to seek an appropriate education for their child and the board always has a duty to provide it. Thus the agreement [i]s no obstacle to a hearing on the current needs

of the child." Plaintiff's Brief at 11

[19, 20] The difference between plaintiff's contention and the Court's position is that the Court presumes that at the time the Agreement was entered, the services and/or program agreed to meet the child's educational needs and, therefore, was in compliance with IDEA. Starting with this presumption, parents do not have such an unabridged right. Parents indeed are barred from trying to change or modify a settlement agreement merely because they find the terms unacceptable. But, parents do have the right to question whether a program delineated in a settlement agreement meets the requirements of IDEA if there has been a change in circumstances, such that the child's educational needs are no longer being met. To avoid reducing settlement agreements in special education cases to a nullity while trying to enforce the statutory requirement, the Court finds that the Agreement between D.R.'s parents and the Board is binding and shall not be set aside, unless it is found that the child's circumstances have changed, whereby enforcing the terms of the settlement would violate IDEA.

3. Res Judicata and the ALJ Decision of January 19, 1993

[21] Pursuant to IDEA, failure to raise an issue at the administrative level will result in waiver of that issue on appeal to this Court. Woods, 796 F.Supp. at 775 (citations omitted). Notwithstanding the above reasoning, if D.R. did not raise the issue that D.R.'s condition had changed since the execution of the Agreement and therefore that the one-to-one aide was educationally necessary below, he is estopped now.

It appears that D.R. did raise the issue of educational

necessity in his first Petition for Hearing. See Plaintiff's Brief, Appendix pp. 54-57, ¶5, 6, 10. While the first petition did not explicitly there was a change in circumstances, it did request an order finding *inter alia* that an aide was necessary. See id. The Court assumes, without deciding, that this was sufficient to constitute a change in circumstances claim. D.R., though, clearly raised the issue of educational necessity. Id. ("D.R. requires the services of a 1 to 1 aide"; "D.R. is in need of the services . . . [of an aide] in order to develop his potential to the fullest").

However, it also appears that D.R. never received the opportunity to be heard on these issues. When plaintiff attempted to raise these issues after the first hearing, he was barred and his petition was dismissed based on the doctrine of res judicata.

The doctrine of res judicata is well established. "A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." Federated Dept. Stores, Inc. v. Moitie, 452 U.S. 394, 398, 101 S.Ct. 2424, 2428, 69 L.Ed.2d 103 (1981) (citations omitted). The Court has long recognized that public policy requires that there be an end to litigation, those who have contested an issue shall be bound by the result of the contest, matters once tried shall be considered forever settled as between the parties. Id. at 401, 101 S.Ct. at 2429.

[22] Application of the doctrine of res judicata requires the satisfaction of three elements: a final judgment on the merits in a prior suit, involving the same parties or their privies, and a subsequent suit based on the same claims. Id. at 399, 101 S.Ct. at 2428; United States v. Athlone Indus., Inc.,

746 F.2d 977, 983 (3d Cir. 1984). The Court is satisfied that in the case at bar the third element is not established; strict application of the doctrine of res judicata requires that this action be remanded.

The first element required for preclusion under res judicata is a prior final judgment. In the case at bar, plaintiff's prior petition was dismissed on December 17, 1992, and as discussed *supra*, was a final resolution of the matter.

The second element of res judicata requires identity of parties. In his first petition, D.R. named himself as plaintiff and the Board of Education as defendant. The second complaint anems the identical plaintiff and defendant. Here, plaintiff has already sued the defendant, thus the prior favorable ruling is available for consideration under the doctrine of res judicata.

[23, 24] The final element for preclusion under the doctrine of res judicata is identity of the cause of action. The Court must consider four factors to determine when suits involve the same cause of action:

(1) whether the acts complained of and the demand for relief are the same (that is, whether the wrong for which redress is sought is the same in both actions;

(2) whether the theory of recovery is the same;

(3) whether the witnesses and documents necessary at trial are the same (that is, whether the same evidence necessary to

> maintain the second action would have been sufficient to support the first); and
>
> (4) whether the material facts alleged are the same.

Athlone, 746 F.2d at 984 (emphasis in original, citations omitted). Searching the record in the case the Court finds that there is no identity of the causes of action for the theories of recovery are different and the witnesses and documents necessary at the hearing are not the same.

The theory for the first and only hearing concerned the validity of the agreement. The theory for the proposed second hearing was founded on IDEA's requirement for educationally necessity. If plaintiff had the opportunity at the first hearing to raise this second theory but for whatever reasons chose not to, then he would be precluded from raising it now. However, from the record before the Court, it appears that plaintiff plead educational necessity but did not have the opportunity to raise this issue as it was reserved due to the bifurcated approach the ALJ adopted. It would offend the concept of justice to preclude plaintiff from having his promised day in court to litigate this reserved issue.

Moreover, the witnesses and documents necessary at the educational necessity hearing are not the same as those that appeared at the first hearing. Given the procedural requirements for the IDEA as set forth in 20 U.S.C. §1414 and state and federal regulations promulgated thereunder, see 34 C.F.R. §300.340-300.349; N.J.A.C. 6.28-2.1-3.9, various experts would testify concerning D.R.'s academic needs with a

view to assisting the ALJ in determining what was appropriate and in D.R.'s best interest. As the issue at the first hearing was construction of the Agreement, and not educational necessity, no experts testified concerning these areas.

The Court finds that given the above the ALJ decision of 1/19/93 was erroneous and that D.R. was not barred from obtaining a hearing on the necessity of a one-to-one aide if such a claim was properly raised by D.R. and through no slumbering on his rights was not heard.

Accordingly, the Court remands this matter to the Office of Administrative Law to determine if D.R. properly raised this issue and whether he slumbered on his rights by not asserting this claim. If the Office of Administrative Law finds that D.R. satisfies those two conditions, then the Court directs the agency to hold a hearing on the educational necessity of the aide.

CONCLUSION

It is clear that the Agreement is binding on the parties. As a matter of law, the Board is responsible for 90% of the increase in costs for the array of services which comprised the 1991-1992 rate. As the aide is a new service not contemplated by the parties at the time the Agreement was entered, and as the Agreement explicitly relieves the Board from "any and all other costs" associated with Benedictine, plaintiff is required to bear the entire cost of the aide.

If this matter solely involving the construction of the Agreement, the Court would deny D.R.'s motion for summary judgment, but grant the Board's cross-motion. However, this action is also governed by IDEA which imposes upon the Board

the obligation and responsibility to provide D.R. with a free appropriate public education.

The Court presumes that at the time it was entered, the agreement reflected an educational program which met the statutory requirement. D.R. must overcome this presumption to void this Agreement. There must be a change in circumstances such that continued enforcement of the Agreement would violate D.R.'s educational rights.

The Court has no evidence to determine whether D.R.'s educational rights are being violated. Moreover, this is a fact-based inquiry. D.R.'s motion and the Board's cross-motion will be denied.

As the proper forum to adjudicate these issues is the Office of Administrative Law, the Court will administratively terminate the within action and will remand it to the Office of Administrative Law.

An appropriate order is attached.

ORDER

It is on this 23 day of November, 1993

ORDERED that plaintiff's motion for summary judgment is denied; and it is further

ORDERED that defendant's cross-motion for summary judgment is denied; and it is further

ORDERED that this matter be remanded to the Office of Administrative Law for a hearing in conformity with this decision; and it is further

ORDERED that this matter is administratively terminated without prejudice.

APPENDIX D

Filed: August 4, 1995

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

No. 94-4167

D.R., BY HIS PARENTS AND LEGAL GUARDIANS,
M.R. and B.R.,

Plaintiffs,

V.

EAST BRUNSWICK BOARD OF EDUCATION,

Defendant.

MEMORANDUM OPINION

This matter is opened before the Court upon the plaintiff's motion and defendant's cross-motion for summary judgment. This matter has been decided upon the written submissions of the parties pursuant to the Federal Rule of Civil Procedure 78. For the reasons given below, plaintiff's motion for summary judgment will be granted and judgment will be entered accordingly.

BACKGROUND

This Court will outline the factual background in this case only briefly here as it has been set forth in full in the prior Opinion of this Court at D.R. by M.R. v. East Brunswick Bd. of Educ., 838 F.Supp. 184 (D.N.J. 1993). This case concerns the rights of D.R., a twenty year old victim of cerebral palsy, under the Individuals with Disabilities Act ("IDEA" or "the Act"), 20 U.S.C. § § 1401, et seq. and a settlement agreement entered into his behalf by his parents with the defendant East Brunswick Board of Education (the "Board").

In the period immediately preceding the events leading to this action, D.R. was a student at the Middlesex County Cerebral Palsy Center (the "CPC"). During the 1991-1992 school year, D.R.'s parents came to believe that he was not making progress at the CPC. In January of 1992, over the objection of the Board, D.R.'s parents removed him from the CPC and placed him in a residential school in Maryland named the Benedictine School. D.R.'s parents simultaneously started this action under the IDEA to compel the Board to pay for D.R.'s placement at the Benedictine School.

This action appeared to be resolved by an agreement between the parties entered into during a mediation conference held on February 3, 1992. In summary, the agreement provided that the Board would pay placement costs at the Benedictine School and 90% of any increase in those costs. Paragraph 3 of the agreement states that "The Board will be absolved of any other or further costs based upon this placement, related services, or transportation connected therewith."

Some months after the agreement was signed, it was

determined by the Benedictine School that D.R. would need the services of a one-on-one aide in order to benefit from the program. The exact timing of this decision and its underlying merit will be discussed more fully below. At the end of the school year, Benedictine officials informed D.R.'s parents that he would not be allowed to re-enroll for 1992-1993 unless a one-on-one aide were provided. The school assessed an extra charge of approximately $30,000 for the aide.

The Board refused to shoulder this extra cost and D.R.'s parents commenced this, their second action, again citing the IDEA. An Administrative Law Judge ("ALJ") of the state Office of Administrative Law ruled against the parents, and they appealed to this Court. This Court issued its opinion remanding the matter to the ALJ in November, 1993.

The precise content of the Court's Opinion is important to the disposition of this case and will be explored below. In brief, the Court found that the settlement agreement was binding, and could only be set aside upon a finding that D.R.'s circumstances had changed such that enforcing the agreement would violate the IDEA. 838 F. Supp. at 194. This holding was predicated, however, on the statement that "the Court presumes that at the time the Agreement was entered, the services and/or program agreed to me[t]] the child's educational needs and, therefore, was in compliance with IDEA." Id. at 193.

On remand, the ALJ once again held in favor of the Board. He found that "the one-on-one aide was educationally

necessary and consistent with the IDEA." A276.[7] However, focusing on the handicap itself, the ALJ also held that, because the handicap had not changes, D.R.'s circumstances had not changed. Thus, the settlement was upheld once more.

D.R.'s parents commenced the instant action, again seeking relief from the decision of the ALJ.

DISCUSSION

The summary judgment standard is well known, and this case present no opportunity for construing the finer points of this procedural device. Summary judgment shall be granted if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). see Hersh v. Allen Prods. Co., 789 F.2d 230, 232 (3d Cir. 1986). In making this determination, a court must draw all reasonable inferences in favor of the non-movant. Meyer v. Riegel Prods. Corp., 720 F.2d 303, 307 n.2 (3d Cir. 1983), cert. dismissed, 465 U.S. 1091 (1984). Whether a fact is "material" is determined by the substantive law defining the claims. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); United States v. 225 Cartons, 871 F.2d 409, 419 (3d Cir. 1989).

The substantive law in any dispute of this type is dominated by the IDEA. The IDEA provides federal funds to states for the purpose of educating children with disabilities.

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[7] The parties have stipulated to a joint appendix in this matter. Page references to this document are prefaced with the letter A.

B.G. by F.G. v. Cranford Bd. of Educ., 702 F. Supp. 140, 1148 (D.N.J.), modified, 702 F. Supp. 1158 (1988), aff'd, 882 F.2d 510 (3d Cir 1989). The law requires that participating states must have in place "a policy that assures all children with disabilities the right to a free appropriate public education." 20 U.S.C. §1412(1). New Jersey is a participating state that receives federal funds pursuant to the IDEA. See Lascari v. Board of Education, 116 N.J. 30 (1989).

"[A] 'free appropriate public education' consists of "educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child 'to benefit' from the instruction." Board of Educ. v. Rowley, 458 U.S. 176, 188-89 (1982). The details of the policy are left to the states. Each state may provide for more than the statuterequires, but the requirements of the federal law remain the "basic floor of opportunity" below which the level of special education provided to the handicapped children may not sink. B.G. by F.G., 702 F. Supp. at 1148 (quoting Rowley, 458 U.S. at 201).

In its last Opinion of this case the Court relied on the case of Woods ex rel. T.W. v. New Jersey Dept. of Educ., 796 F. Supp. 767 (D.N.J. 1992), in which the court examined the relationship of settlement agreements and a school board's statutory duties under the IDEA. In that case, as in the one at bar, the parents of a handicapped child and the school board reached a settlement of a dispute then being heard before an ALJ over the level of care to be provided to the child. Id. at 770. The ALJ approved the agreement, finding that it disposed of all outstanding issues and was consistent with the law. Id.

The court found that, notwithstanding the settlement

agreement, the issue before it was whether the child's educational needs were being met. "Although the Woods voluntar[ily] agreed to forgo [the child's] rights vis-a-vis the Monroe School Board, the School Board still has a duty to comply with the IDEA and New Jersey law and to provide [the child] with a free appropriate public education." Id. at 776. This Court followed Woods, holding that "a board cannot discharge its duty by virtue of a settlement agreement." D.R., 838 F. Supp. at 193

Little need be added to this discussion. The law as set forth in Woods and the prior opinion of this Court establish that the IDEA creates certain rights that cannot be waived by the guardians of a handicapped child, and certain duties that cannot be bargained away by school boards. Private settlement agreements have an analogous relation to the statutory requirements as the state statutory schemes bear to the federal standard. They may provide more than the legal mandate, but not less.

Certain results flow as a matter of logic from the above statement of the controlling law. To recapitulate, when approving the settlement, the ALJ found that the agreement, without the one-on-one aide, was in accordance with the legal requirements. On remand, the ALJ found that (1) the one-on-one aide was "educationally necessary and consistent with the IDEA," A276, and (2) that D.R.'s circumstances had not changed. A273. These rulings are in conflict. If the second two statements are true, the first must be false. If the first statement is

true, one of the second pair must be false. [8]

The Court's prior holding, quoted briefly above, was as follows:

> [T]he Court presumes that at the time the Agreement was entered, the services and/or program agreed to me[t]] the child's educational needs and, therefore was in compliance with IDEA. Starting with this presumption, parents do not have such an unabridged right [to modify a settlement agreement] . . . . But parents do have the right to question whether a program delineated in a settlement agreement meets the requirements of IDEA if there has been a change in circumstances such that the child's educational needs are no longer being met.

838 F. Supp. at 194. The Court need build very little on this holding to find that, absent the presumption on which it was based, (i.e., if the terms of the settlement agreement did not comply with the IDEA), plaintiff may re-open the proceedings and seek to have the settlement terms augmented.

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[8] Thus, there are three possible scenarios. First, contrary to the Court's presumption, the terms of the settlement agreement did not comply with the IDEA, there has been no change in circumstances, and the agreement must be augmented to provide for a one-on-one aide. Second, the settlement was sufficient initially, the ALJ wrongly found no change in circumstances, and the agreement must be modified. Third, the settlement was sufficient initially, there has been no change in circumstances, but the ALJ was in error when he held that a one-on one aide was necessary for D.R. to obtain an "appropriate education."

The Court recognizes that this result is at odds with the off-cited interest of repose served by protecting settlement agreements freely entered into. Indeed, in its earlier Opinion, this Court struck a compromise between the need to "avoid reducing settlement agreements in special education cases to a nullity while trying to enforce the statutory requirements" when it remanded for a showing of changed circumstances. Id. However, the clear thrust of the law in this area is that the sanctity of private bargains must defer to the educational needs of handicapped children.

The Board maintains that the showing of changes circumstances was set our as a threshold issue by this Court's previous Opinion. The Board argues that, because this showing has not been made, all other issues are irrelevant to the Court's determination. As the foregoing discussion makes clear, this argument misses the point. The Court finds that the ALJ's review of the evidence and his ruling rebut the presumption on which the Court relied that the original settlement provided sufficient resources for D.R. As it must always be in IDEA cases, the threshold issue is whether D.R.'s needs are being met in accordance with the legal requirements.

Perhaps perceiving the Achilles heel of its case, arguing in the alternative, the Board urges the Court to find that the ALJ was in error that a one-on-one aide for D.R. is necessary to be in compliance with the IDEA. The applicable standard is whether the child's educational program is "reasonably calculated to enable the child to receive educational benefits." Rowley, 458 U.S. at 207; Fuhrmann ex rel Fuhrmann v. East Hanover Bd. of Educ., 933 F.2d 1031, 1034 (3d Cir. 1993).

The burden of showing that the placement is appropriate

rests always with the school district. Lascari, 116 N.J. at 44. This Court is not to resort to its own "notions of sound education policy," but must give "due weight" to the administrative proceedings. Rowley, 458 U.S. at 205-06. Thus, the Board must make a substantial showing to persuade this Court to set aside the ALJ's finding that a one-on-one aide is required by the IDEA.

The Court finds that the Board has fallen short of making this showing. The thrust of the Board's argument seems to be that, during the initial period of D.R.'s residence at Benedictine, and during the time that the settlement agreement was being negotiated, D.R. was making sufficient progress with the help of an aide during his classes, and a dormitory staff member who helped him with his toilet and with dressing. The Board appears to contend that these services were not within the definition of a one-on-one aide. Defendant maintains that Benedictine represented that the aide and extra dormitory staff were covered by the amount of tuition then being charged to the district. Defendant's Brief at 28-29.

The Board then contends that, at a certain point in time, Benedictine withdrew the services of the aforementioned helpers, and decided that a one-on-one aide was needed at an extra cost. The Board claims that the pupil/staff ratio in the dormitories is 20/1 on weekdays and 140/1 on weekends. It is argued that: "The IDEA does not require that a school district use taxpayer dollars to staff private institutions which are inadequately staffed." Defendant's Brief at 30.

Roughly speaking, this version of events is corroborated by the plaintiff. Plaintiff's parents represent that when D.R. first arrived at Benedictine, he went through a trial placement period

and made good adjustment to the program. Plaintiff's brief at 4 (citing A298-99; A386). During this period he did not have a formal one-on-one aide, but in effect the extra attention he was receiving was the functional equivalent. A67 (testimony of Benedictine Educational Director Nancy McCloy). With this arrangement, D.R. was making progress. A77 (testimony of McCloy).

The school was not willing to divert its resources from other students to help D.R. indefinitely (testimony of McCloy). By April, 1992, Benedictine staff were clear that D.R. needed a one-on-one aide on a permanent basis. Plaintiff's parents contend that D.R. needed more help because the school was placing greater educational demands on him as he moved out of his introductory phase at Benedictine. Plaintiff's Brief at 8; A77, A-96-97 (testimony of McCloy). The record shows that, by April, 1992, D.R. would not focus on his tasks, and could not find his way around the campus. A73-75 (testimony of McCloy). He could not eat without regurgitating food and could not dress himself or use the toilet. Id.

From his review of the evidence, the ALJ stated: "I conclude that the one-to-one aide services . . . were educationally necessary and consistent with the IDEA." A276. The Board contends that this was error because various Benedictine officials testified that D.R. was making some progress before the one-on-one aide was assigned. The foregoing discussion of the undisputed facts, however, shows that D.R. was enjoying extra staff attention during this period and a more relaxed routine that the school could or would sustain on a permanent basis. Therefore, D.R.'s progress during this period is not evidence that the one-on-one aide was not necessary.

Defendant provides no other support for its challenge to the ALJ's finding that the aide is "educationally necessary." Instead, the Board focuses on their contention that Benedictine was inadequately staffed, and that the plaintiff is asking the Board to supply with public money that which the school should be furnishing for the agreed tuition. The Court notes first that the Board has not provided any factual support for the assertion that Benedictine's staffing level is insufficient, nor have they suggested a standard by which the level should be measured. It is certainly far from self-evident that the normal practice at schools of this sort is to provide full-time individualized supervision to its students as part of the standard tuition.

The Board also emphasizes the point that D.R.'s parents unilaterally chose the Benedictine School for him. The Board raises the argument that D.R.'s parents "could have requested alternative placement, but instead to make a known and voluntary decision to continue placement at Benedictine and incur the cost of aides rather than requesting that the district place him somewhere else." Defendant's Brief at 27. This argument would have more force if it appeared anywhere in the record that an alternative placement was available that would have satisfied D.R.'s requirements at a lower cost. The Board has made no such showing. With the Board's acquienscense, D.R. has been at Benedictine since 1992, and there is no evidence that the Board pushed to place him elsewhere. It is far too late in the day for the Board to raise the question of alternative placement now. [9]

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[9] Nor will the Court entertain this argument as one of a failure to mitigate damages. As discussed, no showing of less expensive placement alternatives have been put forward here. As the burdened

The Court believes that the heart of the Board's grievance goes to the timing rather than the substance of the one-on-one requirement. The Board argues that the real change in D.R.'s circumstances came when Benedictine decided that it no longer wished to provide a one-on-one aide under the tuition structure upon which the settlement agreement was based. It is claimed at several points in defendant's papers that the school did not mention the need for a one-on-one aide until well after the parties had entered into the settlement agreement. The Board argues that principles of fairness require denying plaintiff relief, because neither the school or D.R.'s parents told the Board that a one-on-one aide would be required when the Board agreed to pay for D.R.'s placement.

School officials testified that it took them four months to determine that one-on-one assistance was required, because of D.R.'s initial favorable response to the program, and due to a professional reluctance to require the extra attention before a settled pattern has developed. A71-72; A94 (testimony of McCloy). This testimony is certainly plausible and stands unrebutted by any competent evidence offered by the Board. Accordingly, its argument that is has been unfairly prejudiced by the timing of Benedictine's call for a one-on-one aide is drastically undermined.

Moreover, this issue is irrelevant to the matter at hand.

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party, it was the Board's duty to bring such evidence forward in opposition tot he plaintiff's motion for summary judgment. This matter has been winding its way through administrative proceedings and this Court for years. The Court believes that this matter is overdue for a final resolution, and will not prolong the proceedings by permitting a further showing on this issue.

As discussed already, the Board's obligations under the IDEA state the minimum that it must provide. If the professional staff correctly review their view as to the necessity of a one-on-one aide, and this view is endorsed by the ALJ, then the fact that the aide was previously thought unnecessary is not important.

The question here is whether the defendant has sustained its burden to show that no reasonable trier of fact could fail to overturn the finding of the ALJ. This defendant has clearly failed to do. Instead, the Court finds that there is no genuine factual dispute that the ALJ's finding was correct that the one-on-one aide was necessary under the standard set by the IDEA. Therefore, the Court will grant summary judgment to plaintiff on this issue.[10]

Finally, the Court must reject defendant's fairness argument. The Board alleges that D.R.'s parents knew that a one-on-one aide would be required when the settlement was made, but that they concealed this fact. Defendant's Brief at 32. The Board cites as evidence for this proposition that D.R.'s parents were told that D.R.'s admission was on a trial basis, and that modifications in the regimen might be required. However, defendant's citations to testimony that show D.R.'s parents had discussed the possible need for a one-on-one aide, A128 (testimony of D.R.'s mother); A68-70 (testimony of McCloy),

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[10] If Benedictine promised to provide the equivalent of a one-on-one aide for the tuition originally assessed for D.R., a fact the Court finds nowhere in the record, then it is possible that the Board might have rights as the subrogee of D.R.'s parents to enforce this promise. Whether Benedictine should be required to provide the one-on-one aide under the tuition structure originally contemplated by the parties is a contract question outside the scope of this lawsuit.

do not show that the parents knew that a one-on-one aide would become a formal requirement, or that it would cost extra. Moreover, the evidence cited shows that the parents discussed one-on-one aides at the end of February and later. This is well past the date that the settlement was agreed to. This showing falls well short of supporting the claim of an intentional omission that might lead to a finding of unfairness.

CONCLUSION

For the foregoing reasons, the Court finds that the Board is liable under the IDEA for all sums paid by plaintiff for the one-on-one aide and will grant summary judgment to plaintiff accordingly. The parties have not provided the Court with an exact calculation of the amount.expended by D.R.'s parents for which they are due reimbursement. The parties will communicate with the Court within five business days of the receipt of this Order whether the Court need entertain further submissions on damages, or whether this matter may be resolved by the parties.

An appropriate Order is attached.

Dated: August 4, 1995

/ s/ Alfred M. Wolin
ALFRED M. WOLIN
United States District Judge

APPENDIX E

[Filed: August 4, 1995]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

No. 94-4167

D.R., BY HIS PARENTS AND LEGAL GUARDIANS,
M.R. and B.R.,

Plaintiff,

V.

EAST BRUNSWICK BOARD OF EDUCATION,

Defendant.

ORDER REGARDING PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT

In accordance with he Court's Memorandum Opinion filed herewith,

It is on this 4th day of August, 1995,

ORDERED that plaintiff's motion for summary judgment is granted; and it is further

ORDERED that defendant is liable for and shall reimburse to plaintiff any sums paid by plaintiff to the Benedictine School for a one-on-one aide for plaintiff D R ; and it is further

ORDERED that the parties shall communicate to the Court within five (5) business days whether the Court's intervention shall be necessary to fix the exact amount of liability in this matter or what steps the parties have taken promptly to dispose of this matte between themselves.

/ s / Alfred M. Wolin
. ALFRED M. WOLIN
United States District Judge